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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

HEALTHY WORLD, INC., Plaintiff and Appellant, v. L.A. ARENA FUNDING, LLC, et al., Defendants and Respondents.	B188017 (Los Angeles County Super. Ct. No. BS095153)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County, Gregory W. Alarcon, Judge. Affirmed.

Doll Amir & Eley and Gregory L. Doll for Plaintiff and Appellant.

Bate, Peterson, Deacon, Zinn & Young and David H. Bate for Defendants and Respondents.

After appellant's petition to vacate the arbitrator's award was denied and respondents' counterpetition to confirm the award was granted, judgment was entered for respondents. We reject appellant's claim that the arbitrator exceeded his authority and affirm.

BACKGROUND

In 1999, appellant Healthy World, Inc., doing business as Natural Solutions (Natural Solutions), negotiated an exclusive product agreement with the Staples Center. Natural Solutions describes the agreement as "a 'pay to play' situation, in which [it] was required to 'pay' for a luxury suite at the Staples Center in order to 'play' as the exclusive supplier of cleaning products for that venue."

I. The Agreements

Natural Solutions signed two "economically 'linked agreements'" for the luxury suite and the cleaning products. In the five-year Staples Center suite licensing agreement with respondent L.A. Arena Funding (LAAF), an Anschutz Entertainment Group subsidiary that owns the Staples Center's assets, Natural Solutions agreed to pay a $217,500 yearly license fee for a luxury suite (subject to a 7 percent annual escalation clause). In the five-year product placement agreement with respondent L.A. Arena Company (LAAC), an Anschutz Entertainment Group subsidiary that operates the Staples Center, LAAC "agreed to purchase cleaning supplies exclusively from Natural Solutions during the same time period that the Suite Agreement was in effect."

Although the product agreement was signed by LAAF and the suite agreement was signed by LAAC, the two contracts were clearly linked, as stated in paragraph 16 of the product agreement: "This Agreement, together with the Suite Agreement, constitutes the entire agreement between the parties and shall become a binding and enforceable Agreement between the parties hereto and their respective successors . . . ." In addition, paragraph 3(d) of the product agreement provided that upon one party's termination of

the product agreement under paragraphs 3(c) (which allowed termination by either party for any reason upon written notice) or 5(b) (which allowed termination by either party for either party's default beyond applicable grace or cure periods), "the *other* party shall have the right to terminate the Suite Agreement by delivering written notice (the 'Suite Termination Notice') to the other party within 30 days of receiving notice of the termination of this Agreement."[1] (Italics added.)

Both agreements contained arbitration clauses providing for final and binding arbitration "in accordance with the Commercial Arbitration Rules of the American Arbitration Association."

II. The Dispute

Natural Solutions failed to pay two $133,223.43 suite renewal fees that were due on May 1 and August 2, 2002. In July 2002, Natural Solutions purported to terminate the suite agreement, without declaring LAAC to be in default of the product agreement, by giving notice that it "'would be unable to renew the Suite Agreement for an additional term due [to] the overall state of the economy and recession, which has negatively impacted Natural Solutions.'" Nothing in the suite agreement allowed Natural Solutions to cancel the agreement in this manner before the five-year term expired. On the contrary, paragraph 9.1.1 of exhibit A to the suite agreement authorized LAAC to treat the nonpayment of the license renewal fees as a default and, after giving notice and an opportunity to cure, to recover damages, including the licensing fees that otherwise

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[1] A draft version of paragraph 3(d) of the product agreement allowed *either* party to terminate the suite agreement upon either party's termination of the product agreement under paragraph 3(c) or 5(b). The final version, however, allowed only the *other* party to terminate the suite agreement upon termination of the product agreement under paragraph 3(c) or 5(b). In other words, the same party could not terminate both agreements under paragraph 3(d). During arbitration, Natural Solutions sought to rescind both agreements, claiming to have been misled to believe that it could terminate both agreements under paragraph 3(d). The arbitrator rejected this contention, finding that Natural Solutions was not misled.

would be due (but discounted to present value and minus any sums received from relicensing the suite). Accordingly, on September 6, 2002, LAAF, through the Staples Center's assistant general counsel, gave Natural Solutions a written notice of default for its nonpayment of the license renewal fees.

When it gave Natural Solutions the notice of default, LAAF also credited Natural Solutions for the August 31 and October 12, 2002 product invoices (totaling $5,293.49) that were owed by LAAC under the product agreement. At the time, Natural Solutions did not claim (as it did so later at the arbitration) that the $5,293.49 credit constituted a default by LAAC of the product agreement, nor did it claim that it was entitled to terminate the suite agreement, based on LAAC's purported default, under paragraph 5(a)(ii) of the product agreement. Paragraph 5(a)(ii) of the product agreement, which Natural Solutions did not raise until the arbitration, stated that upon giving LAAC written notice of default, Natural Solutions would be excused from paying the licensing fees due under the suite agreement while LAAC remained in default.[2]

III. The Arbitration

In January 2003, LAAF filed for arbitration to recover the suite licensing fees that were lost during the period of at least four months following Natural Solutions' default. Natural Solutions filed a cross-claim to rescind both the suite agreement and the product

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[2] Paragraph 5, "TERMINATIONS/REMEDIES," provided in part: "(a) A party shall be in default hereunder if any of the following events shall occur: [¶] (i) Such party fails to pay to the other party, when due, any sum required by this Agreement to be paid to the other party and the nonpaying party shall fail for a period of ten (10) days following receipt of written notice from the other party specifying such default to cure such default by payment of the amount due; [¶] (ii) Such party fails to perform timely any of its other material obligations hereunder and such default shall continue for a period of thirty (30) days following receipt of written notice from the other party specifying such default. *Notwithstanding the foregoing, during the pendency of any default by LAAC, Company [Natural Solutions] shall be excused from paying any sums owing hereunder or under the Suite Agreement*. . . ." (Italics added.)

agreement based on fraud, negligent misrepresentation, mistake, and failure of consideration.

Natural Solutions' allegations, which the arbitrator rejected on the merits, included the following: (1) because the suite agreement constituted a lease, not a license, LAAF was required to file for unlawful detainer before evicting Natural Solutions from the suite (the arbitrator concluded that the suite agreement constituted a license, not a lease); (2) LAAF fraudulently induced Natural Solutions to sign the product agreement by concealing its wrongful purchase of floor wax from another vendor (the arbitrator found that Natural Solutions was not defrauded because it knew of the other purchase and made a business decision not to pursue its remedies); (3) Natural Solutions was misled concerning its right to cancel both agreements (the arbitrator found that Natural Solutions was not misled); and (4) the $5,293.49 credit for the product invoices constituted a breach by LAAC of the product agreement, which excused Natural Solutions from paying the license renewal fees under paragraph 5(a)(ii) of the product agreement (the arbitrator found that paragraph 5(a)(ii) did not apply because he disagreed that the "provisions of the [product agreement] excusing performance under the Suite License Agreement could apply to a breach of the Suite License Agreement that has already occurred"; moreover, Natural Solutions "did not protest Staples' decision to offset the invoice amount, even though Natural knew that Staples had done so in October, 2002").

Rejecting Natural Solutions' allegations of fraud, misrepresentation, mistake, and failure of consideration, the arbitrator refused to rescind the agreements. The arbitrator determined that Natural Solutions' failure to pay the licensing fees constituted a breach of the suite agreement for which LAAF was entitled to $341,000 in damages, plus expenses.

Natural Solutions petitioned the superior court to vacate the arbitration award on the ground that the arbitrator had exceeded his authority. LAAC and LAAF counterpetitioned to confirm the award. The superior court denied Natural Solutions' petition to vacate and granted the counterpetition. Judgment was entered and this appeal followed.

DISCUSSION

Natural Solutions contends that the arbitrator exceeded his powers in violation of Code of Civil Procedure section 1286.2, subdivision (a)(4) by: (1) granting a remedy prohibited by an "anti-waiver" provision in the product agreement; (2) remaking two other provisions of the parties' agreements; and (3) finding that the suite agreement constituted a license, not a lease. The contentions lack merit. The parties agreed to final and binding arbitration "in accordance with the Commercial Arbitration Rules of the American Arbitration Association," which give the arbitrator "'a broad grant of authority to fashion remedies' [citation] and [a] 'broad scope' in choice of relief [citations]." (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 383-384 (*Intel*).) As we explain below, Natural Solutions has not shown that the parties placed any special restrictions on the arbitrator's broad discretion to fashion remedies. Moreover, the suite agreement specifically authorized the arbitrator to award damages for the nonpayment of the license renewal fees.

I. Standard of Review

Judicial review of arbitration awards is very limited because "arbitral finality is a core component of the parties' agreement to submit to arbitration. Thus, an arbitration decision is final and conclusive *because the parties have agreed that it be so.*" (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 10 (*Moncharsh*).) We generally do not review an arbitrator's decision for errors of fact or law. (*Aguilar v. Lerner* (2004) 32 Cal.4th 974, 981-982.) We also do not review the validity of the arbitrator's reasoning or the sufficiency of the evidence to support the award. (*Moncharsh*, at p. 11.)

We defer to an arbitrator's decision concerning the appropriate remedy for a breach of contract, just as we defer to an arbitrator's finding that the determination of a particular question is within the scope of his or her contractual authority. (*Intel*, *supra*, 9 Cal.4th at p. 372.) "A reviewing court is . . . not in a favorable position to substitute its judgment for that of the arbitrators as to what relief is most just and equitable under all the circumstances. Further, independent review of remedies, no less than of other

arbitrated questions, would tend to increase the cost and delay involved. 'If the courts were free to intervene on these grounds [disagreement with the arbitrators' "honest judgment" as to remedy] the speedy resolution of grievances by private mechanisms would be greatly undermined.' (*Paperworkers v. Misco, Inc.* (1987) 484 U.S. 29, 38.)" (*Intel, supra,* at p. 375.)

Selecting the appropriate remedy for a breach of contract requires the "decisionmaker's flexibility, creativity and sense of fairness. . . . Arbitrators, unless specifically restricted by the agreement to following legal rules, '"may base their decision upon broad principles of justice and equity . . . ." [Citations.] . . . "The arbitrators are not bound to award on principles of dry law, but may decide on principles of equity and good conscience, and make their award *ex aequo et bono* [according to what is just and good]." [Citation.]' (*Moncharsh, supra,* 3 Cal.4th at pp. 10-11.) [Fn. omitted.] Were courts to reevaluate independently the merits of a particular remedy, the parties' contractual expectation of a decision according to the arbitrators' best judgment would be defeated." (*Intel, supra,* 9 Cal.4th at pp. 374-375.)

In our independent review of the superior court's ruling, we defer to the arbitrator's choice of remedies. "[A]n appropriately deferential review starts not from the beginning, but from the arbitrator's own rational assessment of his or her contractual powers and is dependent on (that is, rests on acceptance of) this and any other factual or legal determination made by the arbitrator. The principle of arbitral finality, the practical demands of deciding on an appropriate remedy for breach, and the prior holdings of this court all dictate that arbitrators, unless expressly restricted by the agreement or the submission to arbitration, have substantial discretion to determine the scope of their contractual authority to fashion remedies, and that judicial review of their awards must be correspondingly narrow and deferential." (*Intel, supra,* 9 Cal.4th at pp. 375-376.)

II. The "Anti-Waiver" Provision

In denying Natural Solutions' cross-claim for rescission of the agreements based on fraud and misrepresentation, the arbitrator found that Natural Solutions failed to meet

its burden of showing "that Staples acted intentionally to defraud Natural" by concealing its purchase of a competitor's floor wax. The arbitrator additionally stated that because Natural Solutions was aware of the floor wax purchase but made a business decision not to pursue its legal remedies, there was "a waiver."

On appeal, Natural Solutions argues that because the product agreement contained an "anti-waiver" provision requiring that waivers must be written,[3] the award should be vacated because the arbitrator, acting in excess of his powers, found that there was an unwritten waiver. The contention is unpersuasive. After determining that Natural Solutions was not defrauded regarding the floor wax purchase, which was sufficient to resolve the fraud allegation, the arbitrator further stated that Natural Solutions' business decision not to pursue its remedies was a waiver. The waiver remark was irrelevant to the arbitrator's rejection of the fraud allegation and, particularly because Natural Solutions never gave LAAC a notice of default, could not have been prejudicial even if we assume it was erroneous.

The cases cited by Natural Solutions are distinguishable. In *O'Flaharty v. Belgum* (2004) 115 Cal.App.4th 1044, the parties contractually limited the arbitrator's powers by specifically stating that "'[t]he arbitrator shall not have any power . . . to grant any remedy which is either prohibited by the terms of this Agreement, or not available in a court of law.'" (*Id.* at p. 1057.) The arbitrator's award was vacated in *O'Flaharty* because the arbitration agreement expressly prohibited the type of relief granted. In this case, however, nothing in the agreements prohibited the arbitrator from awarding damages for Natural Solutions' breach of the suite agreement. On the contrary,

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[3] The anti-waiver provision stated, "The delay or failure of a party to assert or exercise any rights, remedy or privilege under this Agreement or to insist on strict and prompt performance of its covenants and agreements, shall not constitute a waiver of any right, remedy or failure to perform nor shall it be construed as a waiver or relinquishment of the party's right to later enforce the same according to its rights under this Agreement if there is a continuous or subsequent default. *No waiver shall be effective unless in writing, and then only in the specific instance for which it was given.*" (Italics added.)

paragraph 9.1.1 of exhibit A to the suite agreement specifically authorized the damages award.

Similarly, in *Bonshire v. Thompson* (1997) 52 Cal.App.4th 803, the parties' agreement expressly barred the arbitrator from considering extrinsic evidence in interpreting the agreement. (*Id.* at p. 806.) In this case, there is no indication that the arbitrator relied on any evidence barred by the agreement.

Natural Solutions contends, however, that it had four theories on which it based its claim for rescission. It asserts that as to two of the theories, mistake and failure of consideration, "the Arbitrator found that 'Natural . . . failed to meet its burden, largely due to the waiver issue.'" Natural Solutions argues that in so finding, "the arbitrator violated his duty, not to rewrite the parties' agreement, and therefore his award should be overturned." We disagree.

Just as the arbitrator relied on a ground other than waiver to resolve Natural Solutions' fraud claim, he did so in refusing to rescind the agreements. After the arbitrator set forth his reasons for finding that Natural Solutions failed to carry its burden of proof, he clearly stated in the award: "There is an additional reason why the Arbitrator would not award rescission of the agreements. The case law is clear that [the] equitable remedy of rescission and restitution is only available if a remedy can be fashioned that restores the parties to the status quo ante. In this case, a number of things occurred that make such a remedy impossible or impractical." He went on to list five reasons why rescission was an inappropriate remedy. Natural Solutions does not address these findings. Thus, even if we were to accept Natural Solutions' argument that by finding there was an unwritten waiver, the arbitrator relied on improper grounds for denying its rescission claim, he also based his ruling in this regard on independent proper grounds.

III. Other Provisions

Natural Solutions contends that the arbitrator exceeded his powers by remaking paragraph 2 of the products agreement, which required LAAC to provide Natural Solutions with a detailed list of complaints and a "30-day cure period" before purchasing

cleaning supplies from other vendors. According to Natural Solutions, by refusing to rescind the agreements, "[t]he arbitrator entirely ignored this 'detailed writing' requirement and 30-day cure period, and, in doing so, remade the contract between the parties."

This contention fails because the arbitrator did not "ignore" the detailed writing requirement and 30-day cure period. Instead, the arbitrator considered the claim for rescission based on the purchases of other cleaning supplies and rejected it on the ground that Natural Solutions had elected to drop the matter in the hope of generating future business opportunities with the owners of the Staples Center. The arbitrator did not remake the agreement, refuse "to hear evidence material to the controversy," or engage in other prohibited conduct that requires us to vacate the award. (Code Civ. Proc., § 1286.2, subd. (a)(5).)

Natural Solutions also argues that the arbitrator remade the parties' agreement and acted in excess of his authority by refusing to apply paragraph 5(a)(ii) to excuse its nonpayment of the licensing fees based on the purported default that occurred when Natural Solutions was credited the amounts due under the product agreement. Natural Solutions has failed to explain why paragraph 5(a)(ii) would apply when, contrary to its express requirements, Natural Solutions never gave LAAC notice of the purported default. But more importantly, Natural Solutions has failed to explain how or why the arbitrator exceeded his authority by determining that paragraph 5(a)(ii) does not apply to these facts. Accordingly, we reject the contention.

IV. License vs. Lease

Natural Solutions contends that the arbitrator erroneously found that the suite agreement constituted a license, not a lease, thereby erroneously depriving it of the protections "embodied in a non-waivable public interest statute, namely, the Unlawful Detainer Act. That statute provides the *only* lawful means for relieving a tenant of his exclusive possession of real property under California law. The arbitrator exceeded his powers by fashioning a remedy that circumvents this vital public interest, and the trial

court erred by confirming the arbitrator's improper ruling." We are not persuaded. As we stated earlier, the arbitrator's factual and legal determinations generally are not subject to judicial review and we may not review the arbitrator's determination that the suite agreement constituted a license.

The only issue relevant to our limited review is whether the agreements required the arbitrator to find that the suite agreement conferred a lease, not a license. Natural Solutions has pointed to nothing in the agreements that imposed such a requirement. On the contrary, exhibit A to the suite agreement stated that in the event of an unlawful detainer action, there would be no change in the character of the license and no creation of a landlord-tenant relationship, thus indicating that the arbitrator was free to decide that the agreement constituted a license, not a lease.

DISPOSITION

The judgment and orders are affirmed. LAAC and LAAF are awarded their costs.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.